

DAVIS WRIGHT TREMAINE LLP

920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
(206) 622-3150 FAX: (206) 757-7700

Kenneth E. Payson (admitted *pro hac vice*)
Davis Wright Tremaine LLP
920 Fifth Ave., Suite 3300
Seattle, WA 98104
Telephone: (206) 757-8126
kennethpayson@dwt.com

James H. Moon (admitted *pro hac vice*)
Davis Wright Tremaine LLP
865 S. Figueroa St., Suite 2400
Los Angeles, CA 90017
Telephone: (213) 633-6819
jamesmoon@dwt.com

Jeff Silvestri (Nevada Bar No. 5779)
McDonald Carano LLP
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: (702) 873-4100
jsilvestri@mcdonaldcarano.com

Attorneys for Defendant Blue Raven Solar, LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

LOUIS NAIMAN,

Plaintiff,

vs.

BLUE RAVEN SOLAR, LLC; RENOVATION
REFERRAL, LLC; and GABRIEL ALAN
SOLOMON,

Defendants.

No. 2:19-cv-01643-JAD-EJY

**DEFENDANT BLUE RAVEN SOLAR,
LLC'S NOTICE OF RELATED CASES
AND UNOPPOSED MOTION TO
CONSOLIDATE**

ORAL ARGUMENT REQUESTED

*[Declaration of Kenneth E. Payson; Index of
Exhibits Filed Concurrently]*

Action Filed: September 18, 2019

TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Defendant Blue Raven Solar, LLC (“Blue Raven”) hereby submits this Notice of Related Cases and Unopposed Motion to Consolidate pursuant to Local Rule 42-1 and Federal Rule of Civil Procedure 42 based on the overlapping parties, claims, and factual and legal issues in (1) *Naiman v. Blue Raven Solar, LLC*, No. 2:19-cv-01643-JAD-EJY (before the Honorable Jennifer A. Dorsey), and (2) *Johansen v. Blue Raven Solar, LLC*, No. 2:20-cv-02116-JCM-BNW (before the Honorable James C. Mahan).

Both cases were filed against Defendants Blue Raven, Renovation Referral, LLC (“Renovation”), and Gabriel Solomon (collectively, “Defendants”), involve claims for violation of the Telephone Consumer Protection Act (“TCPA”), and will require decisions on overlapping issues and defenses, including whether Blue Raven may be held vicariously liable for the calling activity of Renovation and whether Renovation obtained consent to dial plaintiffs and the overlapping putative class. The *Naiman* Court has substantial familiarity with the underlying issues, and has taken under consideration Blue Raven’s Motion for Summary Judgment on the vicarious liability issue. **The other parties to the *Naiman* and *Johansen* Actions have consented to consolidating the two actions.**

Pursuant to Local Rule 42-1(b), this Motion is being filed and served in both actions but should be decided by Judge Dorsey, the judge in the earlier-filed *Naiman* action.

This motion is based on this notice and motion; the attached Memorandum of Points and Authorities; the concurrently filed Declaration of Kenneth E. Payson; all pleadings, records, and files in the *Naiman* and *Johansen* actions; and such evidence and argument as may be presented at or before the hearing on this motion.

Dated: November 30, 2020

/s/ Kenneth E. Payson

Kenneth E. Payson (admitted *pro hac vice*)
Davis Wright Tremaine LLP
920 Fifth Ave., Suite 3300
Seattle, WA 98104

DAVIS WRIGHT TREMAINE LLP

920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
(206) 622-3150 FAX: (206) 757-7700

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

(206) 757-8126
kennethpayson@dwt.com

James H. Moon (admitted *pro hac vice*)
Davis Wright Tremaine LLP
865 S. Figueroa St., Suite 2400
Los Angeles, CA 90017
(213) 633-6819
jamesmoon@dwt.com

Jeff Silvestri (Nevada Bar No. 5779)
McDonald Carano LLP
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
(702) 873-4100
jsilvestri@mcdonaldcarano.com

Attorneys for Defendant Blue Raven Solar, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should consolidate the pending actions (1) *Naiman v. Blue Raven Solar, LLC*, No. 2:19-cv-01643-JAD-EJ (the “*Naiman Action*”), and (2) *Johansen v. Blue Raven Solar, LLC*, No. 2:20-cv-02116-JCM-BNW (the “*Johansen Action*”) because they involve overlapping parties, claims, and factual and legal issues.

The *Naiman Action* was filed in this Court on September 18, 2019. The *Johansen Action* was filed nine months later on June 5, 2020, in the United States District Court for the Southern District of Ohio. On November 17, 2020, the Ohio court granted Blue Raven’s motion to transfer the *Johansen Action* to this Court based on the substantial similarities in parties and issues as the *Naiman Action*. (See Decl. of Kenneth E. Payson (“Payson Decl.”), Ex. F (Transfer Order) at 1-2.)

Both cases involve allegations that Defendants Blue Raven Solar, LLC (“Blue Raven”), Renovation Referral, LLC (“Renovation”), and Renovation’s owner Gabriel Solomon (collectively, “Defendants”) violated the Telephone Consumer Protection Act (“TCPA”). (Payson Decl., Ex. A (*Naiman Am. Compl.*) ¶¶ 47-63; *id.*, Ex. B (*Johansen Compl.*) ¶¶ 63-67.) Although the named plaintiffs in both actions are different, they are both represented by the same attorneys and seek to represent an overlapping national class of individuals called by Renovation as part of its lead-generation activities for Blue Raven. (*Id.*, Ex. A ¶ 55; *id.*, Ex. B ¶ 52.)

The threshold issue in both cases is whether Blue Raven may be held vicariously liable under the TCPA for the calling activities of Renovation based on a theory of actual agency, implied agency, or ratification. The *Naiman* Court is already familiar with these issues because they have been fully briefed in Blue Raven’s pending Motion for Summary Judgment in the *Naiman Action*. (See Payson Decl., Ex. D.) The *Naiman* Court previously granted Blue Raven’s Motion for Protective Order phasing discovery and initially limiting it to the threshold vicarious liability issue. (See *id.*, Ex. C.) If this case continues beyond summary judgment, both actions will also involve litigation of related issues regarding whether Renovation obtained proper

1 consent to dial putative class members and the named plaintiffs, which would serve as an
2 absolute defense in both actions. The exact same evidence would be necessary for both actions.

3 Given these substantial commonalities of the parties, claims, and issues, the pending
4 actions easily meet the standard for consolidation. *See* Fed. R. Civ. P. 42(a) (allowing
5 consolidation “[i]f actions before the court involve a common question of law or fact”); L.R. 42-
6 1(b) (a party may file a motion to consolidate when “it reasonably appears the actions involve
7 common questions of law or fact and consolidation would aid in the efficient and economic
8 disposition of an action”). Indeed, the United States District Court for the Southern District of
9 Ohio transferred the *Johansen* Action to this Court precisely because of the similarities in
10 parties, claims, and issues in the two actions. (*See* Payson Decl., Ex. F (Transfer Order) at 1-2.)
11 As the Ohio court explained, “the parties in the two cases are substantially similar, including
12 identical defendants.” (*Id.* at 2.) In addition, “the cases involve substantial overlap of identical
13 and dispositive issues” (*id.*), including Blue Raven’s absolute defense that it is not vicariously
14 liable for the calling activity of Renovation. (*See id.*, Ex. E (Mot. to Transfer) at 8-11.)

15 The Court should consolidate the *Naiman* Action and *Johansen* Action to avoid
16 inefficient and duplicative legal proceedings involving substantially similar parties, claims and
17 defenses, and the risk of inconsistent judgment on identical issues.

18 **II. FACTUAL BACKGROUND**

19 **A. Renovation Provides Lead-Generation Services to Blue Raven**

20 Blue Raven is a Utah limited liability company with its principal place of business in
21 Utah. (Payson Decl., Ex. A (*Naiman* Am. Compl.) ¶ 7; *id.*, Ex. B (*Johansen* Compl.) ¶ 7.) The
22 company offers solar panel services and products to homeowners across the country. (*Id.*, Ex. A
23 ¶¶ 39-42; *id.*, Ex. B ¶ 21.) To reach its target consumers, Blue Raven bolsters its internal
24 marketing activities with lead referrals from third-party vendors, including a Florida limited
25 liability company called Renovation. (*Id.*, Ex. A ¶ 54; *id.*, Ex. B ¶ 22.) Mr. Solomon owns and
26 operates Renovation. (*Id.*, Ex. A ¶ 9; *id.*, Ex. B ¶ 9.) Based on allegedly unauthorized calling
27

activity by Renovation to generate leads for Blue Raven, all three Defendants are currently co-defendants in two TCPA class action proceedings before this Court.

B. Mr. Naiman Files a Lawsuit in This Court in September 2019

On September 18, 2019, Mr. Naiman filed a putative class action against Blue Raven in this Court alleging violations of the TCPA based on a single allegedly unauthorized phone call he received from Renovation on April 8, 2019. (*See* Payson Decl. ¶ 2, Ex. A ¶¶ 76-79.) Mr. Naiman concedes that Blue Raven did not call him and that his claims against Blue Raven are based exclusively on the theory that Blue Raven is vicariously liable for Renovation's alleged calls. (*See id.*, Ex. A ¶¶ 47-63.) Mr. Naiman seeks to represent a class defined as:

All persons within the United States to whom: (a) Blue Raven Solar, and/or a third party acting on its behalf, made one or more non-emergency telephone calls; (b) promoting Blue Raven Solar products or services; (c) to their cellular telephone number; (d) using an automatic telephone dialing system or an artificial or prerecorded voice; and (e) at any time in the period that begins four years before the date of the filing of this Complaint to trial.

(*Id.*, Ex. A ¶ 55.)

C. A Motion for Summary Judgment Is Pending in the *Naiman* Action

On January 14, 2020, in response to Blue Raven's Motion for a Protective Order in the *Naiman* Action, the Court ordered phased discovery, with the first phase limited to discovery regarding the issue of whether Blue Raven may be held vicariously liable for Renovation's purported calling activity. (*See* Payson Decl., Ex. C.) That phase of discovery is now complete. (*Id.* ¶ 4.) Blue Raven has provided Mr. Naiman with responses to written discovery and has completed its production of promised documents. (*Id.*) Mr. Naiman completed the deposition of Blue Raven's 30(b)(6) corporate representative, Christopher Harman, and Blue Raven's former employee, Ezra Hernandez. (*Id.*) Blue Raven filed a motion for summary judgment on the issue of its vicarious liability on September 20, 2020, which is fully briefed and currently pending in the *Naiman* Action. (*Id.* ¶ 5, Ex. D.)

D. Mr. Johansen Files a Similar Action in Ohio in June 2020

On June 5, 2020, Mr. Johansen filed a putative class action lawsuit in the Southern District of Ohio against the same three Defendants based again on Renovation's purported violation of the TCPA and Blue Raven's purported vicarious liability for Renovation's calling activity. (*See* Payson Decl., Ex. B ¶¶ 63-67.) Mr. Johansen alleges that Renovation called his phone number even though it was listed on the National Do-Not-Call Registry. (*See id.*, Ex. B ¶ 3.) Mr. Johansen seeks to represent a class defined as:

All persons in the United States (1) whose phone numbers were on the National Do Not Call Registry for at least 31 days, (2) but who received more than one telemarketing call from or on behalf of Defendants (3) within a 12-month period, (4) from four years prior the [sic] filing of the Complaint.

(*Id.* ¶ 52.) Mr. Johansen is represented by the same attorneys representing Mr. Naiman. (Payson Decl. ¶ 2.) Mr. Johansen's claims against Blue Raven are also based on the theory that Blue Raven is vicariously liable for Renovation's alleged calls. (*Id.*, Ex. B ¶¶ 34-50.)¹

E. The Johansen Action Is Transferred to This Court

On November 17, 2020, the Ohio court granted Blue Raven's Motion to Transfer the *Johansen* Action to this Court pursuant to the "first-to-file" rule. (Payson Decl., Ex. F at 1.) "The rule provides that when actions involving nearly identical parties and issues have been filed in two different district courts, the court in which the first suit was filed should generally proceed to judgment." (*Id.*) The Ohio court found the rule applicable because "the parties in the two cases are substantially similar, including identical defendants," and "the cases involve substantial overlap of identical and dispositive issues." (*Id.* at 2.) Defendants Renovation and Mr. Solomon joined in the motion to transfer, and Mr. Johansen did not oppose the motion. (*Id.* at 1.)

¹ Mr. Johansen's attorneys appear to have used their *Naiman* complaint as a template for their complaint in this action, often using identical allegations. (*See* Payson Decl., Ex. G (comparison of complaints).) The "Preliminary Statement" in both complaints is exactly the same except changing the plaintiff's name and changing references to the "Do Not Call List" to automated calling. (*Id.*, Ex. G at 1.) Both pleadings include nearly identical allegations regarding Blue Raven's "Liability for Renovation Referral's Conduct." (*See id.*, Ex. G at 10-14.)

F. Both Cases Are Now Pending in This Court Before Different Judges

Following the transfer to this Court, the *Johansen* Action was assigned case number 2:20-cv-02116-JCM-BNW (ECF No. 40), and randomly assigned to District Judge James C. Mahan and Magistrate Judge Brenda Weksler. The *Naiman* Action has been proceeding before District Judge Jennifer A. Dorsey and Magistrate Judge Elayna J. Youchah.

On November 17, 2020, Blue Raven’s counsel reached out to counsel for the parties in both the *Naiman* Action and *Johansen* Action regarding their positions regarding consolidation. (*See* Payson Decl. ¶ 10, Ex. H.) All parties indicated that they consent to consolidation. (*Id.*) In particular, counsel for the plaintiffs and counsel for Mr. Solomon and Renovation indicated that they consent to consolidation on November 25, 2020 and November 30, 2020, respectively. (*Id.*)

III. ARGUMENT**A. The *Naiman* Action and *Johansen* Action Should Be Consolidated.**

Pursuant to Federal Rule of Civil Procedure 42(a), “[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.” Under Local Rule 42-1(b), a party may file a motion to consolidate when “it reasonably appears the actions involve common questions of law or fact and consolidation would aid in the efficient and economic disposition of an action.” *Harrington v. Tackett*, 2019 U.S. Dist. LEXIS 118331, at *15 (D. Nev. July 11, 2019).

“The district court has broad discretion . . . to consolidate cases pending in the same district.” *Inv’rs Research Co. v. United States Dist. Court*, 877 F.2d 777 (9th Cir. 1989). “In determining whether to consolidate, the court ‘weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause.’” *Harrington*, 2019 U.S. Dist. LEXIS 118331, at *15 (quoting *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984)). “Generally, ‘unless the party opposing [consolidation] can show demonstrable prejudice’ consolidation is appropriate.” *Long v. Las Vegas Valley Water Dist.*, 2015 U.S. Dist.

1 LEXIS 119234, at *4 (D. Nev. Sep. 4, 2015). “Furthermore, it is not uncommon for courts to
2 consolidate cases for purposes of discovery only.” *Id.*

3 “Consolidation requires only a common question of law or fact; perfect identity between
4 all facts and issues . . . is not required, so long as there is some commonality of issues.” *Willows*
5 *Account, LLC v. AG/ICC Willows Loan Owner, LLC*, 2014 U.S. Dist. LEXIS 76872, at *4 (D.
6 Nev. May 28, 2014). The pending actions easily meet this standard because they involve
7 substantially overlapping parties, claims, defenses, and evidence.

8 *First*, the two actions involve TCPA claims against the same parties. The three
9 Defendants—Blue Raven, Renovation, and Mr. Solomon—are identical in both cases. (*See*
10 Payson Decl., Ex. A ¶¶ 7-9; *id.*, Ex. B ¶¶ 7-9.) Although the named plaintiffs are different, they
11 are represented by the same attorneys. (*See id.* ¶¶ 2-3.) Both named plaintiffs seek to represent
12 an overlapping national class of individuals who received calls from or on behalf of Blue Raven
13 in violation of the TCPA. (*See id.*, Ex. A ¶ 55; *id.*, Ex. B ¶ 52.) In particular, both classes
14 require its members to have received telemarketing calls on behalf of Defendants. (*Id.*) The
15 only difference is the *Naiman* Action requires class members to have received one or more of
16 these calls on their cell phone where automatic dialing systems were used, whereas the *Johansen*
17 Action requires class members to have received more than one call while being on the Do-Not-
18 Call Registry. (*See id.*) These classes would necessarily overlap as to any individual who
19 received more than one call on his or her cell phone that was on the Do-Not-Call Registry.

20 *Second*, the two actions involve similar questions of fact and law. Both cases involve
21 allegations that Defendants violated the TCPA based on the same calling activity of Renovation
22 in its efforts to generate leads for Blue Raven. In both actions, the named plaintiff alleges that
23 Renovation—not Blue Raven—placed the calls at issue. (*See* Payson Decl., Ex. A ¶¶ 47-63; *id.*,
24 Ex. B ¶¶ 63-67.) The slight difference in the issues between the cases are that Renovation
25 allegedly violated the TCPA’s prohibition on placing marketing calls to cell phones without
26 adequate consent in the *Naiman* Action (47 U.S.C. § 227(b)(1)(A)(iii)), and violated the TCPA’s
27 prohibition on placing calls to cellular and residential subscribers who have registered their

1 phone numbers on the national Do-Not-Call registry in the *Johansen* Action (47 C.F.R.
2 §§ 64.1200(c)(2) & (e)).

3 *Third*, Defendants’ defenses will substantially overlap in both cases despite plaintiffs’
4 slightly different TCPA claims. In both actions, Blue Raven’s defense that it is not vicariously
5 liable for the actions of Renovation will be dispositive. To establish vicarious liability under the
6 TCPA, a plaintiff must prove an agency relationship through federal common law agency
7 principles—(1) actual authority, (2) apparent authority, or (3) ratification. *See Jones v. Royal*
8 *Admin. Servs., Inc.*, 887 F.3d 443, 449 (9th Cir. 2018). As explained in detail in its pending
9 Motion for Summary Judgment in the *Naiman* Action, Blue Raven’s contract with Renovation
10 precludes any theory of actual authority for Renovation’s calls. (Payson Decl., Ex. D at 13-17.)
11 Similarly, Blue Raven never manifested to either plaintiff that Renovation was working on its
12 behalf. (*Id.* at 17-20.) Lastly, Blue Raven could not have ratified Renovation’s actions because
13 Renovation was never its agent. (*Id.* at 20-27.) Even if it is determined that Blue Raven may be
14 held vicariously liable for Renovation’s calling activity, it will be a defense to the merits of both
15 sets of TCPA claims that Renovation obtained proper consent from putative class members and
16 the named plaintiffs. *See* 47 U.S.C. § 227(b)(1)(A) (excepting from liability under TCPA’s
17 restrictions of autodialed calls to cellular numbers calls made with “prior express consent of the
18 called party”); 47 C.F.R. 64.1200(c)(2)(ii) (providing defense to TCPA’s Do-Not-Call
19 restrictions by obtaining “prior express invitation or permission”); *Gulden v. Dickey’s Barbeque*
20 *Rests., Inc.*, 2018 U.S. Dist. LEXIS 218757, at *6 (D. Ariz. July 9, 2018) (“prior express
21 invitation or permission, as expressed under § 64.1200(c)(2)(ii), the [Do-Not-Call] regulation the
22 alleged violation is brought under pursuant to § 227(c)(5), is a complete defense to a plaintiff’s
23 TCPA claims”).

24 *Fourth*, in both actions the parties will need to analyze the identical records of calls
25 Renovation placed to identify which calls reached business lines (for which no liability can lie
26 under plaintiffs’ theories in either case, 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R.
27 §§ 64.1200(c)(2) & (e)), and which calls reached residential lines (for which no liability can lie

1 in the *Naiman* Action, 47 U.S.C. § 227(b)(1)(A)(iii)). The same depositions and written
2 discovery relating to the relationship between Blue Raven and Renovation—which have already
3 been provided in the *Naiman* Action—will likely have to be duplicated for the *Johansen* Action
4 if the cases are not consolidated. (*See* Payson Decl. ¶ 4.)

5 There are no countervailing considerations of “inconvenience, delay, or expense” to any
6 party based on a consolidation of the *Johansen* Action and *Naiman* Action. *See Harrington*,
7 2019 U.S. Dist. LEXIS 118331, at *15. To the contrary, absent consolidation, the overlap in
8 factual issues and substantive defenses will entail redundant and inefficient discovery and motion
9 practice in two cases currently proceeding before two sets of judicial officers. The actions
10 should be consolidated to avoid these inefficiencies and the risk that substantially similar issues
11 based on the same underlying factual and legal issues could be decided inconsistently.

12 **B. Alternatively, the Cases Should Be Assigned to the Same Judicial Officers.**

13 Even if the Court determines that consolidation is not appropriate, the Court should
14 assign both cases to a single district judge in accordance with local practice given the
15 indisputable relatedness of parties and issues in the two actions. *See Willows Account*, 2014 U.S.
16 Dist. LEXIS 76872, at *6; *Rkf Retail Holdings v. Tropicana Las Vegas*, 2016 U.S. Dist. LEXIS
17 200154, at *3 (D. Nev. May 10, 2016). As explained above, the Court may achieve substantial
18 efficiency by having the same judicial officers that have been involved in the *Naiman* Action for
19 nearly a year decide parallel and similar issues in the *Johansen* Action.

20 **IV. CONCLUSION**

21 The Court should grant this unopposed motion to consolidate the *Naiman* Action
22 and *Johansen* Action before District Judge Jennifer A. Dorsey and Magistrate Judge Elayna J.
23 Youchah given the substantial overlap in parties, claims, and legal and factual issues. In the
24 alternative, District Judge Dorsey and Magistrate Judge Youchah should be assigned to both
25 cases.
26
27

DAVIS WRIGHT TREMAINE LLP

920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
(206) 622-3150 FAX: (206) 757-7700

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Dated: November 30, 2020

/s/ Kenneth E. Payson

Kenneth E. Payson (admitted *pro hac vice*)
Davis Wright Tremaine LLP
920 Fifth Ave., Suite 3300
Seattle, WA 98104
(206) 757-8126
kennethpayson@dwt.com

James H. Moon (admitted *pro hac vice*)
Davis Wright Tremaine LLP
865 S. Figueroa St., Suite 2400
Los Angeles, CA 90017
(213) 633-6819
jamesmoon@dwt.com

Jeff Silvestri (Nevada Bar No. 5779)
McDonald Carano LLP
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
(702) 873-4100
jsilvestri@mcdonaldcarano.com

Attorneys for Defendant Blue Raven Solar, LLC

DAVIS WRIGHT TREMAINE LLP

920 Fifth Avenue, Suite 3300
Seattle, Washington 98104-1610
(206) 622-3150 FAX: (206) 757-7700

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notifications of such filing to all counsel of record as of the time of the filing.

/s/ Kenneth E. Payson

Kenneth E. Payson